SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 713

WILLIAM JOSEPH BREAULT AND BONNIE JO ELLEN KATHRYN BREAULT,

Petitioners,

vs.

HAROLD L. FEIGENHOLTZ, EXECUTOR OF THE WILL OF OSCAR J. BREAULT, DECEASED; ESTELLE ANGELA BREAULT, KENNETH BREAULT, WESLEY MEMORIAL HOSPITAL, A CORPORATION, AND HAROLD L. FEIGENHOLTZ, INDIVIDUALLY AND AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OSCAR J. BREAULT, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.....

WILLIAM JOSEPH BREAULT AND BONNIE JO ELLEN KATHRYN BREAULT,

Petitioners,

vs.

HAROLD L. FEIGENHOLTZ, EXECUTOR OF THE WILL OF OSCAR J. BREAULT, DECEASED; ESTELLE ANGELA BREAULT, KENNETH BREAULT, WESLEY MEMORIAL HOSPITAL, A CORPORATION, AND HAROLD L. FEIGENHOLTZ, INDIVIDUALLY AND AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OSCAR J. BREAULT, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on June 13, 1967.

I.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court is unreported. It is printed in the appendix prepared for the use of the court below and filed herewith pursuant to para-

graph 3 of Rule 21. (App. 221-229.) The opinion of the court below is printed in Appendix A hereto *infra* and is reported in 380 F. 2d 90.

II.

JURISDICTION.

The judgment of the court below was entered on June 13, 1967. (App. B *infra*, p. 16.) Petitions for rehearing and rehearing *en banc* timely filed on June 27, 1967 were denied on July 13, 1967. (App. C and D *infra*, pp. 17-18.) The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

III.

QUESTIONS PRESENTED.

1. Does the existence of the requisite jurisdictional amount depend on the capacity of the defendant to pay, or an estate to distribute, to plaintiffs, amounts in excess of the jurisdictional amount?

2. If a defendant or an estate's incapacity to pay to plaintiffs amounts in excess of the jurisdictional amount is a bar to jurisdiction, should the trial court include among the defendant's or the estate's assets to be measured for this purpose unliquidated claims belonging to the defendant or to the estate in amounts that give the defendant or the estate such capacity?

3. If the defendant's or estate's incapacity to pay to plaintiffs amounts in excess of the jurisdictional amount is a bar to jurisdiction, as of what time are the defendant's or estate's assets to be measured for that purpose?

4. If a defendant's or estate's incapacity to pay to plaintiffs amounts in excess of the jurisdictional amount is a bar to jurisdiction, is plaintiff not entitled to a hearing on the questions of fact and issues of law that must be re-

solved to determine the defendant's or estate's capacity to pay amounts in excess of jurisdictional amount?

IV.

THE STATUTE INVOLVED.

The statutory provision involved is 28 U. S. C. § 1332, which provides in pertinent part as follows:

> "(a) District courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs and is between—
>
> (1) Citizens of different states; * * *"

V.

STATEMENT OF THE CASE.

This is a diversity action brought by two infant children of Oscar Breault contesting the validity of Oscar's will because of the undue influence exercised by one Harold L. Feigenholtz in the framing of that will. (App. 5-12.) The contestants are citizens of Kentucky. The proponents, including Harold L. Feigenholtz, executor under the will, are all citizens of Illinois.

When the action was commenced, the estate was inventoried by Feigenholtz at a value in excess of $500,000. (App. 66-67.) Only one claim was filed against the estate in the sum of $118.00. (App. 159.) It was the contention of the contestants that, if the will were declared invalid, they would be entitled to their statutory shares of the estate, each share amounting to a sum far in excess of $10,000.

After the commencement of this action, Feigenholtz filed an amended inventory which distinguished between Oscar's personal assets, valued by Feigenholtz at $25,805, and the

property over which Oscar exercised his power of appointment by the will in question. The latter was valued by Feigenholtz at $477,568.80. (App. 110-112.) The power of appointment had been given to Oscar by his mother, Kathryn Breault, in her will. Feigenholtz and Dahm were trustees under Kathryn's will. As such trustees they then filed claims against Oscar's estate in the sum of $37,363.47, to which Feigenholtz, as executor of Oscar's will, consented. The claims were allowed in an *ex parte* hearing in the Probate Court. (App. 102-108.)

Feigenholtz then filed a motion to dismiss this action on the ground that the amount in controversy did not exceed $10,000, because Oscar's personal estate was insolvent and the property appointed under the will was no proper part of the estate because that property would pass under Kathryn's will if Oscar's will were not admitted to probate. (App. 23-27.) In a separate proceeding, the Supreme Court of Illinois held that the property that was the subject of the power of appointment need not be inventoried in Oscar's estate. *In re Estate of Breault*, 29 Ill. 2d 165, 174-178 (1963). The Supreme Court of Illinois held, at the same time, that Feigenholtz and Dahm, as trustees under Kathryn's will, were obliged to render an accounting to the estate of Oscar Breault. *Id.* at 178-179.

Thereafter the Probate Court allowed interim fees to the attorney for the executor under Oscar's will, to be paid out of the properties that were the subject of the power of appointment. The Illinois Appellate Court held that although the appointive assets were not part of Oscar's estate for purposes of inventory, they were equitable assets of the estate. *In re Estate of Breault*, 63 Ill. App. 2d 246, 264-266 (1965). The court held at the same time that if Oscar's will should be defective as an exercise of the power of appointment, Oscar's creditors would be preferred in equity to the takers in default of appointment,

pursuant to a rule of equity in Illinois that "* * * where there has been a defective execution, the court will supply the defective execution in favor of a purchaser, creditor, wife or child . . ." *In re Estate of Breault,* 63 Ill. App. 2d 246, 265-266, quoting from *Gilman* v. *Bell,* 99 Ill. 144.

There is still pending an action in the Probate Division of the Circuit Court of Cook County to determine the amount of the Oscar Breault estate's claim against Feigenholtz and Dahm for an accounting under Kathryn's testamentary trust. The claim was alleged in these proceedings to be in excess of $1,000,000. (App. 205, 225-226.) The District Court denied leave to file an amended and supplemental complaint in this action to show the detailed basis for the estate's claim against Feigenholtz and Dahm pending in the probate proceedings. (App. 197-217.) The trial court dismissed the complaint for want of jurisdictional amount. (App. 226.) It was this judgment that was affirmed by the Court of Appeals for the Seventh Circuit on June 13, 1967. (App. A & B, *infra,* pp. 9-16.) On July 13, 1967, petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals. (App. C & D, *infra,* pp. 17, 18.)

VI.

REASONS FOR GRANTING THE WRIT.

1. The judgment and opinion of the Court below creates a novel doctrine of widespread importance in the administration of the federal judicial system, to wit, that in determining the existence of jurisdictional amount, the trial court shall determine whether the defendant or an estate is capable of paying to plaintiff an amount in excess of the statutory minimum. This position would require an additional inquiry oft-times of great complexity before the trial court could proceed to hear a case whether arising under diversity jurisdiction or general federal question jurisdiction.

2. The judgment and opinion of the Court below contradicts two primary rules that this Court has laid down for the determination of the existence of jurisdictional amount.

A. "It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289 (1938). See *Sears Roebuck & Co.* v. *American Mutual Liability Company*, 372 F. 2d 435 (7th Cir. 1967). For the plethora of other cases following this rule see 2A Moore's Federal Practice 833 n. 5 (2nd ed.). Certainly in the instant case there is no legal certainty that contestants cannot recover more than the jurisdictional amount. If, as the Illinois courts have ruled, the appointive assets are considered equitable assets of the estate, *In re Estate of Breault*, 63 Ill. App. 2d 246, 264-266 (1963); *Gilman* v. *Bell*, 99 Ill. 144, 149-151 (1881) and see A. L. I., Restatement of Property § 347(b); A. L. I. Restatement of Restitution, § 184(j), certainly the value of recovery, if they are successful, would far exceed the jurisdictional amount. So too, whether or not the appointive assets are part of the estate, if the unliquidated claim of the estate against the trustees under Kathryn's will is allowed, it cannot be said with legal certainty that the value of contestants' rights would not far exceed the jurisdictional amount.

B. "Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289-290 (1938). Again the supporting cases are legion. See *e.g. Gulf Refining Company* v. *Price*, 232 F. 2d 25, 30, cert. den. 352 U. S. 981 (5th Cir. 1961) and the cases cited in 2A Moore's Federal Practice 831, n. 1.

Feigenholtz filed an amended inventory because of the

filing of this action. (App. 59-60.) He improperly attempted to release the estate's claim for an accounting. *In re Estate of Breault*, 29 Ill. 2d 165, 179 (1963). With the disapproval of the so-called "Fourth Report and Account" by the Supreme Court of Illinois (*In re Estate of Breault*, 29 Ill. 2d 165, 179) there is, as shown by the document alone, $61,321.06 to be accounted for by Feigenholtz and Dahm to Oscar's estate. (App. 92.)

Certainly defendants should not be permitted to rely on their own misconduct to destroy the jurisdiction of the District Court.

3. The opinion below conflicts with the reasoning of this Court in *Overby* v. *Gordon*, 177 U. S. 214, wherein this Court held that the amount of the estate which passes by a will, if held valid, constitutes the matter in dispute on a contest of the will, without regard to the amount of the interest of any one of the contestants, within the meaning of the Act of Congress of February 9, 1893 (27 Statutes at Large 436) requiring the matter in dispute on appeal from a judgment of the Court of Appeals of the District of Columbia to exceed the sum of $5,000. cf. *Morgan* v. *Adams*, 211 U. S. 627.

CONCLUSION.

For the reasons herein stated petitioners pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 13, 1967.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

SEPTEMBER TERM, 1966 — APRIL SESSION, 1967.

No. 16048

WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT,

Plaintiffs-Appellants,

v.

HAROLD L. FEIGENHOLTZ, Executor, of the Will of Oscar J. Breault, deceased; ESTELLE ANGELA BREAULT, KENNETH BREAULT, WESLEY MEMORIAL HOSPITAL, a corporation, and HAROLD L. FEIGENHOLTZ, indiviually and as Trustee under the Last Will and Testament of Oscar J. Breault, deceased,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 13, 1967.

Before SCHNACKENBERG, CASTLE and FAIRCHILD, *Circuit Judges.*

CASTLE, *Circuit Judge.* Plaintiffs-appellants, William Joseph Breault and Bonnie Jo Ellen Kathryn Breault,

two of the heirs of Oscar J. Breault, deceased, brought this proceeding in the District Court to set aside the Will of Oscar J. Breault as the product of undue influence. Plaintiffs' complaint, filed July 1, 1960, alleged diversity of citizenship and that "the amount involved herein exceeds the sum of $10,000.00 exclusive of interest and costs". The complaint also alleged that if the instrument purported to be the last will and testament of Oscar J. Breault "is found and held to be invalid as herein prayed, plaintiffs, as heirs, will be entitled to money and property exceeding in value the amount devised and bequeathed to them under said instrument by more than $10,000.00 exclusive of interest and costs". The defendant, Harold L. Feigenholtz, individually, and as executor and trustee under the Will of Oscar J. Breault, filed a motion to dismiss the complaint[1] on the ground that the court lacked jurisdiction because the matter in controversy is less than the requisite jurisdictional sum or value. The motion was supported by affidavit that Oscar's estate was insolvent. At a hearing before the court on March 30, 1961, various exhibits were introduced in evidence and testimony adduced on the issue of solvency of Oscar's estate as bearing on the existence of the requisite jurisdictional value. On November 13, 1961, the court entered an order remitting the plaintiffs to the State courts for such proceedings as would result in a final determination of whether at the date of the filing of the complaint the estate of Oscar was entitled to an accounting from the executors or trustees of the estate of Kathryn M. Breault, Oscar's mother, as claimed by plaintiffs, and if so, the amount thereof, and whether Oscar's estate was solvent or insolvent. Hearing on the motion to dismiss for want of jurisdiction was suspended pending such proceedings. No review of this order was sought.

---

1. The motion was later joined in by the remaining defendants-appellees.

The provisions of Oscar's will, and the provisions of the will of his mother, Kathryn M. Breault, insofar as they are pertinent to the instant litigation, are set forth in *Breault* v. *Feigenholtz,* 7 Cir., 358 F. 2d 39, 41-42, cert. den. 385 U. S. 824, and need not be repeated here.

The record discloses that following the November 13, 1961, order the plaintiffs participated in state court actions culminating in final determinations that the provisions of Oscar's will exercising his testamentary power of appointment over the property in his mother's testamentary trust did not constitute such trust property a part of Oscar's estate (*In re Estate of Oscar J. Breault,* 29 Ill. 2d 165) and that Oscar's estate was insolvent (*In re Estate of Breault,* 63 Ill. App. 2d 246, 263).

On October 6, 1966, the plaintiffs moved for leave to file a tendered amended and supplemental complaint represented as setting forth "with particularity" an additional allegation, made on information and belief, that the estate of Oscar has an uninventoried claim against Harold L. Feigenholtz and Richard Dahm[2] in excess of $1,000,000.00. The defendants filed objections to the motion for leave to file on the ground, *inter alia,* that the averments of the tendered complaint are inadequate to confer jurisdiction. The court treated the objections as a motion to dismiss on the basis of which the court denied leave to file the tendered amended and supplemental complaint and entered an order dismissing plaintiffs' action for want of federal jurisdictional

2. The tendered amended and supplemental complaint named Richard Dahm, also an executor and trustee under the will of Kathryn M. Breault, as an additional party defendant. An earlier, June 27, 1966, motion to file an amended complaint alleging the existence of such uninventoried claim against Feigenholtz and Dahm was denied "without prejudice" on the ground that the amended complaint then tendered failed to meet the requirement of Rule 9(b) of the Federal Rules of Civil Procedure that allegations of fraud be stated with particularity. Other objections thereto were not passed on.

amount. The plaintiffs' motion to vacate the order of dismissal was denied, and plaintiffs appealed.

In the posture in which this case reaches us it is clear that the assets of Kathryn M. Breault's testamentary trust are not a part of Oscar's estate. *In re Estate of Oscar J. Breault,* 29 Ill. 2d 165. And it is equally clear from the record herein, as well as from the determination made in *In re Estate of Breault,* 63 Ill. App. 2d 246, that from the standpoint of inventoried assets and of the claims subsequently filed in and allowed by the Illinois probate court Oscar's estate has at all times been insolvent. Thus, unless, as plaintiffs contend, the allegations of the tendered amended and supplemental complaint are of themselves adequate, in the face of the challenge to jurisdiction made by defendants, to establish the existence of the requisite jurisdictional "value"[3] it was not error for the District Court to deny the motion for leave to file and to dismiss the action.

The federal diversity action the plaintiffs seek to maintain is a proceeding to set aside a will. The action seeks only an adjudication as to whether or not the instrument produced is the will of the testator. *Strachan* v. *Nisbet,* 7 Cir., 202 F. 2d 216, 219; Ill. Rev. Stat. 1965, ch. 3, § 92. It is not an action for a money judgment or decree, in which instance the "sum" claimed controls the existence of the requisite jurisdictional amount if the claim is apparently made in good faith, and under the rule of *St. Paul Mercury Indemnity Co.* v. *Red Cab Company,* 303 U. S. 283, 288-289, "[i]t must appear to a legal certainty that the claim is

3. Although plaintiffs, on brief, also contend it was error for the district judge to dismiss the action for want of jurisdictional amount "without a hearing when on the record before him he was not and could not have been convinced to a legal certainty that the requisite amount was not present", they point to nothing in the record which shows they urged the necessity of a further evidentiary hearing before the District Court or in their motion to vacate the order of dismissal.

really for less than the jurisdictional amount to justify dismissal". Here, as in *Hague* v. *C. I. O.*, 307 U. S. 496, 507, the relief sought is of a nature that a motion to dismiss based upon the absence of jurisdictional amount calls for substantial proof on the part of the plaintiffs of facts justifying the conclusion that the action involves "value" in the necessary amount. In view of the challenge made, mere averment of the amount claimed to be in controversy is not enough to confer jurisdiction. And the existence of such "value" is to be measured by that which the plaintiffs seek to gain by their action—the pecuniary consequence to them. *Cf. Overby* v. *Gordon*, 177 U. S. 214; *Morgan* v. *Adams*, 211 U. S. 627. *Thomson* v. *Gaskill*, 315 U. S. 442, 447.

We recognize that it places a heavy burden upon the plaintiffs to require that they make substantial proof of facts which would justify the conclusion that Oscar's estate possesses an uninventoried claim based on derelictions of the executors and trustees of Kathryn's will and testamentary trust which would result in Oscar's estate recovering thereon a sufficient amount to discharge all of the obligations against it and to distribute to plaintiffs amounts meeting the jurisdictional requirement. But, it was the intent of Congress drastically to restrict federal jurisdiction in diversity cases (*St. Paul Mercury Indemnity Co.* v. *Red Cab Company*, 303 U. S. 283, 288) and that plaintiffs may find it difficult to adduce satisfactory proof does not require that bare allegations, based on information and belief be accepted as establishing the existence of jurisdictional amount.

Plaintiffs' reliance upon our recent decision in *Sears, Roebuck and Co.* v. *American Mutual Liability Insurance Company*, 7 Cir., 372 F. 2d 435 (No. 15792, Opinion filed February 10, 1967) is misplaced. In that case Sears was the defendant in a pending product liability suit brought

in an Illinois state court by a customer seeking recovery of $500,000 damages for personal injuries. Sears brought a diversity declaratory judgment action in federal district court against American Mutual alleging that it was the product liability insurer of Flagg-Utica Corporation from whom Sears had purchased the product involved, and that the coverage afforded under the policy issued by American Mutual extended to Sears as a vendor of the product supplied by Flagg-Utica. Sears sought a declaratory adjudication that the insurer was obligated to defend Sears and to pay any judgment rendered against Sears. The district court dismissed Sears' complaint. This Court reversed. One of the grounds upon which the district court dismissed was that Sears might not be found liable in the state court litigation, in which case the costs of defense of the suit would likely be less than $10,000. The district court reasoned that this would cause a failure of jurisdictional amount and render any prior federal declaration moot. This Court in reversing relied upon the rule set forth in *St. Paul Mercury Indemnity Co., supra,* and held that Sears' claim met the requisite jurisdictional amount. It is obvious that the pending $500,000 suit against it afforded Sears with a "good faith" basis for its allegation of the existence of requisite jurisdictional amount.

Our decision in *Sears, supra,* with respect to the existence of requisite jurisdictional amount is of no aid to the plaintiffs. The instant appeal does not involve an action in which a federal court adjudication of monetary liability to plaintiffs is sought, and the rule of *St. Paul Mercury Indemnity Co.* therefore applicable, as was the case in *Sears.*

In their brief plaintiffs allude to the fact that the District Court entered an order in this action, like that entered in their declaratory judgment action reviewed in

Breault v. *Feigenholtz*, 7 Cir., 358 F. 2d 39, denying their petition for approval of the settlement agreement which was involved in the case last cited. They request that we reconsider our ruling in that appeal affirming the District Court's refusal to approve the proposed settlement agreement (358 F. 2d 39, 44) and attempt to present additional argument on the merit of our previous decision. Our decision affirming the District Court's action in rejecting the settlement agreement is conclusive on that matter and we decline to reconsider it. The ruling in the previous case estops plaintiffs from relitigating that issue.

The judgment orders appealed from are affirmed.

AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.
Chicago, Illinois 60604.

Tuesday, June 13, 1967.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Thomas E. Fairchild, Circuit Judge.

WILLIAM JOSEPH BREAULT, *et al.*,
Plaintiffs-Appellants,

No. 16048 *vs.*

HAROLD L. FEIGENHOLTZ, Executor of the Will of Oscar J. Breault, deceased, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment orders of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C.

UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.
Chicago, Illinois 60604.

Thursday, July 13, 1967.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Thomas E. Fairchild, Circuit Judge.

WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT, *Plaintiffs-Appellants,*

No. 16048 *vs.*

HAROLD L. FEIGENHOLTZ, Executor etc., *et al.*, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED that the petition for a rehearing of this cause filed by the appellants herein be, and the same is hereby DENIED.

APPENDIX D.

UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.
Chicago, Illinois 60604.

Thursday, July 13, 1967.

Before:

Hon. John S. Hastings, Chief Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Win G. Knoch, Circuit Judge,
Hon. Latham Castle, Circuit Judge.
Hon. Roger J. Kiley, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge,
Hon. Thomas E. Fairchild, Circuit Judge,
Hon. Walter J. Cummings, Jr., Circuit Judge.

WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT, *Plaintiffs-Appellants,*

No. 16048 *vs.*

HAROLD L. FEIGENHOLTZ, Executor etc., *et al.*, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court *en banc* that the petition for a rehearing *en banc* of this cause, filed by the appellants herein, be, and the same is hereby DENIED.

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No. 713

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT,

Petitioners,

vs.

HAROLD L. FEIGENHOLTZ, as Executor and Trustee under the last will and testament of Oscar J. Breault, deceased, and individually; ESTELLE ANGELA BREAULT; KENNETH BREAULT; and WESLEY MEMORIAL HOSPITAL, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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UNITED STATES LAW PRINTING CO., CHICAGO 38, ILL. LA Review 3-6181

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WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Statement.

The petition for a writ of certiorari seeks to draw in question the propriety of a decision of the Court of Appeals

for the Seventh Circuit affirming the dismissal for want of federal jurisdictional amount of a will contest in a diversity case, on the grounds, principally, that the court below misapprehended *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, and misread the oral and documentary evidence, which included 111 exhibits introduced by respondent.

Petitioners' petition for a rehearing and for a rehearing *en banc* was unanimously denied.

This occurred against a background of other unrelenting and generally unsuccessful litigation on their part that commenced seven years ago and shows no signs of exhaustion. *In Re Estate of Breault*, 29 Ill. (2) 165, 193 N.E. (2) 824 (1963); *In Re Estate of Breault*, 63 Ill. App. (2) 246, 211 N.E. (2) 424 (1965); *Breault* v. *Marovitz, Judge of the United States District Court*, mandamus, C.A. 7, No. 15155 (1965) unreported; *Breault* v. *Feigenholtz*, 250 F. Supp. 551 (1965), aff'd. 358 F. (2) 39 (1966), cert. den. 385 U.S. 824 (1966).

Their propensity is all the more amazing when it is considered that Oscar's estate is hopelessly insolvent, and that in *Breault* v. *Feigenholtz*, the courts told them that if Oscar's will were set aside, his mother's testamentary trust property, totaling over $400,000, would pass to the three charities named in her will as remaindermen; and that in that litigation, petitioners averred they were the owners of the equitable title to Oscar's estate, as well as the owners of his mother's trust assets, and they personally, not Oscar's estate, were entitled to the uninventoried accounting they here assert belongs to Oscar's estate.

The motive for their perseverance emerged parenthetically for the first time in par. 9 of their motion to vacate the District Court's dismissal order, wherein they stated that one of the three charities has since 358 F. (2) 39 (1966) assigned its interest to them. (App. 235).

While this purported assignment, if otherwise valid, could not enhance their statutory standing to maintain the will contest under Illinois law, *Selden* v. *Ill. T. & S. Bk.*, 239 Ill. 67, 75, 87 N.E. 860; Ill. Rev. Stat. 1965, ch. 3, sec. 90, it might give them as assignees one-third of the trust property, if they set Oscar's will aside.

Argument.

I.

The Rules of this Court, effective October 2, 1967, have not been complied with.

Petitioners have not filed within the time prescribed by law a transcript of the record of the proceedings in the District Court, certified by the clerk of that Court, as required by Rule 21 (1) (2) and Rule 22 (3). Former Rule 21 (3) does not appear in the new Rules. We introduced in evidence 111 exhibits, many of which are inadequately described in their appendix in one sentence each. Although they had ample time, they failed to apply for a stay of mandate, and refiled their will contest in the State Court, where it is now pending.

II.

The decision of the Court of Appeals was clearly correct.

The Factual Basis.

While the action was brought by two minor children in 1960, they attained their majorities during the pendency of the action in the District Court. (App. 230)

Their assertion that only one claim was filed against the probate estate (Pet. p. 2), is erroneous.

Twenty-seven claims of Oscar's creditors, aggregating $17,363.47 were paid with funds advanced by the trustees. One of these claims was for Oscar's income tax amounting to $12,539.67. (App. 105, 106). Instead of filing these claims separately, the trustees of the mother's trust, over which Oscar exercised his power of appointment by his will, filed their own claim for $17,363.47 within the time allowed by

law. (App. 105, 106). (Def's. Exhibits 41 to 63, 78 to 105, incl.; App. 114, 116, 117-120).

Ill. Rev. Stat. 1965, ch. 3, sec. 204 provides that all claims against an estate, except expenses of administration and surviving spouse's or child's awards, not filed within nine months from the issuance of letters testamentary, are barred as to the estate inventoried within that time.

Another claim filed by the trustees within the statutory time was for $20,000 and interest on a note and chattel mortgage dated January 5, 1959, on account of funds advanced Oscar to purchase a boat. (App. 102-104; Def's. Exhibits 31-37, incl., App. 113, 114). The note and mortgage had been marked cancelled after Oscar's death to facilitate the sale of the boat, but the proposed deals fell through, and the purported cancellation, being without consideration, was ineffective between the parties. (App. 172-174).

Petitioners attacked the executor's consent to the trustees' claims, 29 Ill. (2) 165, 171, but the State Supreme Court said "we see neither waste, wilfulness, nor bad faith". (p. 180)

There was a funeral expense claim for $893.75. (Def's. Exhibits 64, 106, App. 116, 118).

There was a claim of another law firm for $1000 for services rendered Oscar in his lifetime. (App. 171, Def's. Exhibit 67, App. 116).

There were other claims amounting to $637.89 (Def's. Exhibits 65, 66, 68, 69, 70, App. 116, 117), in addition to the foregoing, that were allowed by the Probate Court. Illinois law does not require notice to all parties of the hearing on claims. Interested parties, receiving notice of

the filing of the will for probate, are required to follow all proceedings, except those which the law specifies for notice.

The trustee advanced other large sums totalling $60,573.83 for administration expenses and taxes. (App. 117, 120, 124, 125, Def's. Exhibits 72, 73, 74, 75, 76, 77, 107, 108, 109, 109A).

Taxes accrue and are due as of the date of decedent's death. *Board* v. *Illinois,* 404 Ill. 193, 198, 88 N.E. (2) 489; *Nat. Safe Dep. Co.* v. *Stead,* 250 Ill. 584, 597, 95 N.E. 973.

Oscar's third wife received a widow's award of $4500. (App. 24). The widow's award is a preferred claim and a debt of the estate. *In Re Guttman's Estate,* 349 Ill. App. 58, 110 N.E. (2) 87, 89.

There was a tentative assessment of federal estate tax of some $39,000, made on the basis of the executor's figures. (App. 125, Def's. Exhibit 30, App. 113). We cannot discuss the later deficiency assessment, now in the Tax Court, because it is not in the record.

The fees of the executor, and his then counsel, Busch, to July 1, 1960, were estimated at $2500. (Appellee's App. 10).

On the other hand, Oscar left no cash, but only personal property of an estimated value of $25,705. (App. 23). The bill of appraisement approved by the Probate Court March 8, 1960, showed $26,880; but that included diamonds which belonged to the mother, and not Oscar. (Appellee's App. 28-30).

The estate's deficiencies exceeded $100,000.

Petitioners filed a claim for $5,605.02, which is pending. (App. 24).

Ann Jensen, Oscar's first wife, and Kenneth Breault, the adult son of that marriage, filed a claim for $21,125, and interest, which is pending. (App. 24).

On July 12, 1960, the Probate Court approved the executor's amended inventory which differentiated between Oscar's personal estate of $25,705, and the appointive trust property of $477,567.60. (App. 110-112).

In Re Estate of Breault, 29 Ill. (2) 165, 178, 193 N.E. (2) 824, (1963), the Illinois Supreme Court held that the appointive assets were not a part of Oscar's estate, and were not required to be inventoried there.

In Illinois, executors are not estopped by their inventories. *Damiani* v. *De Trana,* 206 Ill. App. 64, 68; *Tartt* v. *Wahl,* 77 Ill. App. 578. The approval of an inventory is not an adjudication of the right of property. *Simms* v. *Guess,* 52 Ill. App. 543, 546. The listing or improper listing of property, or failure to list it, in an inventory is not determinative of the title thereto, and does not affect the true title. *Ginocchia* v. *Frederick,* 153 N.E. (2) 476, 19 Ill. App. (2) 303 (abst.). Inventories are not admissible against the other defendants, *First Nat. Bk.* v. *McCarthy,* 334 Ill. App. 480, 493, 494, 82 N.E. (2) 496, or even against the executor when he is sued with others. *Joyal* v. *Pilotte,* 293 Ill. 377, 381, 127 N.E. 471; *cf.* Ill. Rev. Stat. 1965, ch. 3, sec. 177.

As to the claim for the accounting from the trustees for the period from January 1, 1959 to July 16, 1959, the trustees' fourth report and account was not disapproved by the State Supreme Court. That Court held only that the administrator to collect had no authority to approve it, and that such a claim should have been included in the executor's first account. *In Re Estate of Breault,* 29 Ill. (2) 165, 179, 193 N.E. (2) 824.

Had the claim been included in Oscar's estate for its full face amount, the estate would still be insolvent. However, the trustees' fourth account, received in evidence here, showed in detail the receipts and disbursements (App. 92-94).

Petitioners did not contradict it, although they were afforded access to records (App. 60); they took Feigenholtz's discovery deposition (App. 27); the trustees were available; and they had Feigenholtz, and his then attorney, Busch, on the witness stand for examination on the hearing on the motion to dismiss. (App. 121-177). A trustee is presumed to have acted in good faith and to have performed his duties. The burden of proving his breach of trust is upon the one asserting it. *First-Trust Joint Stock Bank* v. *Hickok,* 367 Ill. 144, 148, 10 N.E. (2) 646; *People* v. *Barrett,* 405 Ill. 188, 196, 90 N.E. (2) 94.

The Appellate Court of Illinois, in an opinion by Mr. Justice Kluczynski (now a justice of the Illinois Supreme Court) affirming the Probate Court's finding of insolvency with relation to Oscar's estate, noted that the trustees were claiming for that six month period $12,539.67 due them from Oscar's estate, besides advances and taxes paid by them, and their allowed claims. *In Re Estate of Breault,* 63 Ill. App. (2) 248, 262, 211 N.E. (2) 424 (1965).

It is a matter of wonderment that the hearing on the trustees' fourth report filed years ago has never been held.

Petitioners infer that the appointive property became part of Oscar's estate, contrary to the State Supreme Court decision, because they were referred to as equitable assets by the Appellate Court. The Appellate Court did not quite say that. It added "so far as his creditors are concerned".

It also referred to the appointive property as "nonprobate" property. (pp. 266, 267,268). We need not belabor this point because it was squarely passed upon in *United States* v. *Field*, 255 U.S. 257, 263, 264, where the Court said in regard to the same contention:

> "and whether the power be or be not exercised, the property that was subject to appointment is not subject to distribution as part of the estate of the donee."

With reference to their uninventoried accounting claim for $1,000,000, which is lacking in merit on its face, they had every opportunity to support it by evidence, but failed. After the late District Judge Miner, on November 13, 1961, remitted them to the state courts to obtain determinations in regard to the accounting, and the solvency of Oscar's estate (App. 178, 179), as to which order no review was sought, cf. *England* v. *Medical Examiners*, 375 U.S. 411, 413, footnote 2, they took the wrong route.

After the Illinois Supreme Court told them that the uninventoried accounting claim went "beyond the issues of the case and the jurisdiction of the probate court", 29 Ill. (2) 165, 180, they reversed their course abruptly and decided to claim the trust property and the accounting for themselves. *Breault* v. *Feigenholtz*, 358 F. (2) 39, 46, affm'g. 250 F. Supp. 551; cert. den. 385 U.S. 824.

When they secured the assignment from one of the charities after their defeat in 358 F.(2) 39, they changed their course again, and pressed for a determination of the will contest, claiming that Oscar's estate had the million dollar claim against the trustees, whose three reports and accounts for the period from the inception of the trust to the end of 1958 were approved in writing by him. (App. 71-92).

When District Judge Marovitz announced his decision to dismiss the will contest, petitioners neither then, nor in their motion to vacate, urged the necessity of a further evidentiary hearing. Nor did they do so unqualifiedly in the Court of Appeals.

Courts do not approve, especially in connection with the administration of probate estates, of the assumption of inconsistent positions and of oppressive and harrassing delays practiced by dissatisfied beneficiaries "for the self-serving purpose of solving the controversy they have created." *Breault* v. *Feigenholtz,* 358 F. (2) 39, 44 (1966).

The Appellate Court of Illinois said in effect they could not claim for themselves an accounting in the Federal Court, and claim in the State Court that the accounting belongs to Oscar's estate. *In Re Estate of Breault,* 63 Ill. App. (2) 246, 261, 211 N.E. (2) 424.

Two state courts and two federal courts have declared Oscar's estate insolvent. This Court has only recently said again that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi* v. *Immigration Service,* 385 U.S. 630, 635.

The Legal Basis.

28 U.S.C. sec. 1332 contains the words "sum or value". It has never been held by this Court that the words are synonymous or interchangeable.

"Sum" relates to an action for a money judgment or decree, or one sounding in damages. "Value" relates usually to an action for property or title thereto, or some question affecting its enjoyment or possession, and arises quite frequently in injunction proceedings. 21 C.J.S. p.

68, sec. 57; 30 A.L.R. (2) 616, annotation; 81 L. Ed. 190, annotation.

The prime question in a will contest is indicated in the words of the state statute:

> "An issue at law shall be made whether or not the instrument produced is the will of the testator." Ill. Rev. Stat. 1965, ch. 3, sec. 92.

The statute says further:

> "Matters not germane to the distinctive purpose of the proceeding shall not be introduced by joinder, counterclaim, or otherwise". Ill. Rev. Stat. 1965, ch. 3, Sec. 5.

The Court below interpreted this language on another occasion. *Strachan* v. *Nisbet*, 202 F. (2) 216, 219, C.A. 7.

"Sum" cannot be involved in such a proceeding. Petitioners recognized this when their complaint alleged:

> "If said instrument is found and held to be invalid, as herein prayed, plaintiffs, as heirs, will be entitled to money and property exceeding in value the amount devised and bequeathed to them under said instrument by more than $10,000 exclusive of interest and costs." (App. 6).

Incidentally, this is not an allegation that the claim of any single plaintiff exceeds the jurisdictional amount. *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 589; *Pinel* v. *Pinel*, 240 U.S. 594, 597 (will case).

"Sum" cannot ordinarily be proved without a trial on the merits, and the Federal Courts are not in favor of two trials on the merits. Hence the area of jurisdictional attack is limited to the face of the complaint and good faith, in such a case. "Value", however, can be proved without a trial on the merits, as in the case at bar.

Even if under federal law, "value" could not be questioned preliminarily, its determination would still have to be made prior to the decision on the merits under the Illinois statute, which provides that only an "interested person" may file a will contest. Ill. Rev. Stat. 1965, ch. 3, sec. 90. That issue is jurisdictional, *Strachan* v. *Nisbet,* 202 F. (2) 216, 218, 219, C.A. 7, and was likewise raised by respondent here. (App. 187, 188)

An "interested person" means one who has been detrimentally deprived by a will in a pecuniary sense of property he would have otherwise had, in the absence of the will. One who is deprived of nothing by the will, but is thereby given benefits he otherwise could not have had, is not an "interested person", and cannot contest the will. *Selden* v. *Ill. T. & S. Bk.,* 239 Ill. 67, 79, 87 N.E. 860.

This Court has said that the plaintiff must prove it by "competent proof", and by "a preponderance of the evidence", and not by "mere averment", whenever jurisdictional "value" is challenged, or whenever it appears by suggestion of the parties, or otherwise, that jurisdiction in that respect is lacking. Even an appellate court must notice its absence. *McNutt* v. *General Motors,* 298 Ill. 178, 189; *Hague* v. *Committee,* 307 U.S. 496, 507; *KVOS* v. *Associated Press,* 299 U.S. 269, 278, 280; *Thompson* v. *Gaskill,* 315 U.S. 442, 446; *St. Paul Indemnity Co.* v. *Red Cab Co.,* 303 U.S. 283, 288, footnote 10; *cf.* Federal Rule 12 (h) (3). Mr. Justice Roberts, who delivered the opinion in St. Paul Indemnity, 303 U.S. 283, made the distinction clearly in *Hague,* 307 U.S. 496, 507.

The existence of such "value" is to be measured by that which the plaintiff seeks to gain by his action, its pecuniary consequence to him. *Seslar* v. *Local Union,* 186 F. (2) 403, 406, C.A. 7; cert. den. 341 U.S. 940; *Landers* v. *Vischer*

Products Co., 201 F. (2) 319, 329, C.A. 7; *Nord* v. *Griffin*, 86 F. (2) 481, 483, C.A. 7; cert. den. 300 U.S. 673. Also: *Selden* v. *Ill. T. & S. Bk.*, 239 Ill. 67, 79, 87 N.E. 860.

The Court said long ago that the test of "value" is "money value", and where that is involved, the matter in dispute must have a "known and certain value, which can be proved and calculated in the ordinary mode of a business transaction". *Barry* v. *Mercein*, 5 How. (46 U.S.) 103, 12 L.Ed. 70. Where that is involved, the subject matter must be presently measurable by some recognized pecuniary standard. Speculative anticipation will not support jurisdiction. *Vicksburgh etc. Co.* v. *Natten*, 58 F. (2) 979, 980, C.A. 5.

Overby v. *Gordon*, 177 U.S. 214, is not in point.

That was not a diversity case. Involved was a caveat objecting to the admission of a will to probate in a local District of Columbia court on the ground that the testator was domiciled in Georgia, where a will contest was one in rem. The only issue submitted to the jury was domicile. Therefore this Court decided it had jurisdiction of the caveators' appeal under the Act of 1893 because "the contention was advanced by virtue of a claim of common title in the next of kin of the decedent to the corpus of the estate, such title, if any, being derived from the law of the alleged domicile. In this aspect, the amount of the estate was the matter in dispute. *New Orleans etc. Co.* v. *Parker*, 143 U.S. 42, 51-52, and cases there cited". *Overby* v. *Gordon*, 177 U.S. 214, 218.

The New Orleans case pointed out the distinction between proceedings in rem and those inter partes. At pp. 221, 223, 227, of *Overby*, the Court made the same distinction, and held that under Georgia law, the proceeding was one in rem.

Additionally, *Overby* did not involve appointive property, which here does not pass as a part of Oscar's estate. *In Re Estate of Breault*, 29 Ill. (2) 165, 174, 178; 193 N.E. (2) 824.

In Illinois, a will contest is an independent proceeding inter partes, and is not a claim of common title. *McCreary* v. *Bartholf*, 305 Ill. 325, 327, 330, 137 N.E. 242; *Lewark* v. *Dodd*, 288 Ill. 80, 85, 123 N.E. 260; *Walker* v. *Cook*, 294 Ill. 294, 128 N.E. 584; *McGee* v. *Vandeventer*, 326 Ill. 425, 432, 433, 158 N.E. 127.

The fact the petitioners' claim may be derived from a single instrument, or they may have a community of interest, does not make it one of common title. *Pinel* v. *Pinel*, 240 U.S. 594, 596; *Thomas* v. *Gaskill*, 315 U.S. 442, 447.

Moreover, in view of the prior adjudications here that if Oscar's will were set aside, the mother's trust estate would pass to her three charities, the claim of common title to an insolvent estate would prove sterile.

The policy of the statute conferring diversity jurisdiction calls for its strict construction. *Thomson* v. *Gaskill*, 315 U.S. 442, 446.

Petitioners' hope in pressing the will contest now lies, not in what they will gain as Oscar's heirs, but in realizing on the assignment they obtained in 1966.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

Office-Supreme Court, U.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 713

WILLIAM JOSEPH BREAULT AND BONNIE JO ELLEN KATHRYN BREAULT,
Petitioners,

vs.

HAROLD L. FEIGENHOLTZ AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OSCAR J. BREAULT, DECEASED, AND INDIVIDUALLY; ESTELLE ANGELA BREAULT, KENNETH BREAULT AND WESLEY MEMORIAL HOSPITAL A CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED BY THE BRIEF IN OPPOSITION.

1. Did this Court by eliminating former paragraph 3 of Rule 21 which provided that the requirement of paragraph 1 with respect to the filing of a transcript of the record shall be "deemed satisfied" if the petitioner files a copy of the appendices filed by all parties below, together with all the proceedings in the court below, the whole duly certified, intend thereby to require that a petition for cer-

tiorari be accompanied by the original District Court record on appeal including exhibits?

2. If, as contended by respondent Feigenholtz, jurisdictional amount in a will contest brought by the heirs of the testator is not to be determined by the amount which would pass by the contested will if valid, pursuant to the reasoning in *Overby* v. *Gordon*, 177 U. S. 214, 217-218, but is to be determined by the pecuniary consequences to each heir, then are such pecuniary consequences subject to the control of the defendant executor, and are they to be determined from *dicta* and without regard to plaintiffs' good faith claim as to the pecuniary consequences to each of them?

ARGUMENT.

I.

When petitioners filed a copy of the appendices filed by the parties below, together with all the proceedings in the court below, duly certified by the clerk of the court below, with their petition, there was substantial compliance with paragraph 1 of Rule 21 and paragraph 1 of Rule 22. The subsequent filing of all of the original District Court record on appeal with the exception of defendant's exhibits, together with the opportunity of respondent Feigenholtz to have filed his exhibits pursuant to paragraph 4 of Rule 21 obviates any prejudice to respondent Feigenholtz.

An additional question raised in Respondent Feigenholtz's Brief in Opposition warrants the granting of certiorari. It concerns the proper procedure for seeking review in this Court pursuant to its new Rules 21 and 22 effective October 2, 1967.

Respondent's argument is that certified copies of the printed appendices prepared for use by the court below and filed with the petition do not constitute compliance with Rules 21 and 22.

The question derives from the fact that in accordance with long standing practice petitioner did not ask the court below to stay the mandate. See *Carr* v. *Zaja*, 283 U. S. 52 and cases cited therein. Therefore, on July 19, 1967 the mandate of the Court of Appeals was issued and the original record certified by the District Court was returned to that court. On July 21, 1967 the clerk of the District Court notified respondent Feigenholtz to withdraw his "physical and large documentary exhibits, if any", and Feigenholtz withdrew all of his exhibits.

After the petition for certiorari was docketed in this Court and at the suggestion of the clerk of this Court, there having been raised a question as to the meaning of the revised rules, petitioners asked respondent Feigenholtz to stipulate that the case be heard on the printed appendices as certified by the clerk of the Court of Appeals. Feigenholtz refused so to stipulate. Petitioners then asked the clerk of the District Court to transmit the original District Court record to this Court. The clerk of the District Court asked Feigenholtz for his exhibits in order to file them with this Court. Feigenholtz refused to comply with the request. (See correspondence file, Clerk of the Supreme Court, Supplemental Court of Appeals Transcript.)

The clerk of the District Court has now transmitted to this Court all of the District Court record except defendant's exhibits. Rule 21, paragraph 4 permits respondent Feigenholtz to file his exhibits if they are believed by him to be relevant to the issues in this Court and he has not done so.

The argument of respondent Feigenholtz is that under this Court's new rule the only way a litigant can protect his statutory right to file a petition for certiorari in this Court is either to obtain a stay of mandate from the Court of Appeals or from a justice of this Court in

order to retain the district court record in the Court of Appeals for transmission to this Court. This would be a radical departure from past practice and an unreasonable burden on the business of the courts of appeal and of this Court.

It should be noted that there was no complaint below that the appendix description of exhibits was inadequate. (See certified copy of Appellee's Brief and Appendix filed with the Petition.) To the extent that respondent Feigenholtz felt a description was inadequate he set out in full certain of his exhibits in his supplemental appendix, a certified copy of which was filed with the Petition. He fails to show in what respect the description of his exhibits not set out in full is inadequate for the purposes of the petition for certiorari. In fact, he utilizes the printed appendix description of his exhibits in his argument on the merits. (Brief in Opposition, pp. 4-8.)

It is submitted that respondent Feigenholtz has not been prejudiced and that he raises the question solely in an effort to evade a review of important questions of federal jurisdiction. However, immediate resolution of the question raised is one of far-reaching importance to the administration of this Court and of the courts that are subject to review by this Court. Certainly the matter is one that calls for clarification at the earliest possible time and for a resolution that will not unduly impose on the administration of the courts of the federal system. Granting review in this case will afford an opportunity for a speedy resolution of this important question.

II.

The opinion of the court below is clearly erroneous in that it (a) fails accurately to state the manner in which the jurisdictional question arose and was decided, (b) is silent with respect to material facts critical to the District Court's jurisdiction, (c) erroneously concludes from dicta that Oscar's estate was "at all times" insolvent, (d) gives no "reasoned justification" for failing to follow Overby v. Gordon, 177 U. S. 214, (e) holds that jurisdictional amount is to be determined by the pecuniary consequences to each plaintiff, (f) assumes that conditions subsequent to the filing of the action under the control of a defendant executor can be determinative of such pecuniary consequences and (g) holds that the good faith claim of plaintiffs as to the pecuniary consequences to them can be disregarded because this is not an action in which a federal court adjudication of monetary liability to plaintiffs is sought.

Respondent Feigenholtz's Brief in Opposition is replete with misstatements of fact and an attempt to argue the merits of the questions presented by petitioners to this Court for resolution. The remainder of this Reply Brief, therefore, is offered to the Court to correct the inaccuracies of respondent lest the Court be misled into improper decision on the sole question as now before it—whether the case is one appropriate for its consideration.

Contrary to the assertion in the Brief in Opposition, the opinion below is not "clearly correct."

(a) The opinion does not accurately state the manner in which the jurisdictional question arose and was decided.

The opinion states, "Hearing on the motion to dismiss for want of jurisdiction was suspended pending such proceedings" (App. A to Petition, p. 10), but fails to state that on November 16, 1964, District Judge Marovitz

denied the motion to dismiss for want of jurisdictional amount. (App. F to Petition, p. 29, App. 4, 184-185, Petition for Rehearing, pp. 15-17.) At that time, which was after the decision of the Supreme Court of Illinois in *In re Estate of Breault,* 29 Ill. 2d 165, and after the Probate Division of the Circuit Court had allowed executor's attorney's fees to the attorney for respondent Feigenholtz out of the appointive assets, the district judge stated: "There is a substantial estate here involving at least a half a million dollars or more * * *." (App. 185, Petition for Rehearing, p. 15.)

Thereafter respondents filed their answers to the complaint and the cause was at issue on the merits as well as on the jurisdictional amount question as raised by respondent Feigenholtz's answer. (App. 185.) However, there were no further evidentiary hearings and there was no pending motion to dismiss when Judge Marovitz, in the course of ruling on petitioners' motion for leave to file an amended and supplemental complaint and objections thereto undertook to dismiss the cause for want of federal jurisdictional amount. His decision was not based on the evidence heard by Judge Miner. (App. 185-231, Petition for Rehearing, pp. 15-17.) Compare *Sears Roebuck & Company* v. *American Mutual Liability Insurance Company,* 372 F. 2d 435 (7th Cir., 1967).

(b) The opinion is silent with respect to material facts critical to the jurisdictional question.

The opinion does not disclose that in hearings before the late Judge Miner petitioners had proved that at the time of the commencement of this action the inventoried value of Oscar's probate estate exceeded $500,000. (Plaintiffs' Ex. 5 received in evidence March 31, 1961, as shown by Transcript of Proceedings before Judge Miner filed February 1, 1967, App. 62, 65-67, Petition for Rehearing, pp. 3-4.) Respondent Feigenholtz had treated the appointive assets as a part of the probate estate (App. 59-60, 66-69) in

accordance with accepted practice. *In re Estate of Breault,* 63 Ill. App. 2d 246, 264, quoting 3 Restatement-Property (Future Interests-Powers of Appointment) (1940), § 329, pp. 1865-1866. See *In Re Estate of Breault,* 29 Ill. 2d 165, 169.

But after respondent Feigenholtz was served with a summons and a copy of the complaint (App. 157) he filed his amended inventory and claims against the estate and obtained *ex parte* allowances thereof. This was barely before the period for filing claims expired. (App. 157, Petition for Rehearing, pp. 5-6.) See *In re Estate of Breault,* 29 Ill. 2d 165, 170.

The Supreme Court of Illinois held that the appointive assets did not *necessarily* have to be inventoried and accounted for by Feigenholtz as Oscar's executor. *In re Estate of Breault,* 29 Ill. 2d 165, 173, 178. It did not hold that their devolution is unaffected by the will contest.

When this action was dismissed for want of jurisdictional amount no account by respondent Feigenholtz as executor had yet been approved in the state court, and that situation persists today. Also, at that time there were and there still are, pending proceedings in the Probate Division of the Circuit Court of Cook County to ascertain the amount of the estate's claim for an accounting from Feigenholtz and Dahm which petitioners have alleged in the state court, and in this action, exceeds one million dollars. (App. E to the Petition, pp. 23-24, Petition for Rehearing, pp. 11, 21-22.) There has been no hearing as yet in the state court on the accounting filed by Feigenholtz and Dahm, or on the citation proceedings because respondent Feigenholtz and his co-trustee under Kathryn's trust have filed original mandamus proceedings in the Supreme Court of Illinois to prevent the circuit court judge assigned to the Probate Division from holding hearings on the accounting claim. Such mandamus proceedings are pending. *Dahm et al.* v. *Corcoran, Circuit Judge,* No. 40560 in the Supreme Court of Illinois.

(c) *In Re Estate of Breault,* 63 Ill. App. 2d 246, does not constitute a final determination that Oscar's Estate was "at all times" insolvent, and particularly that it was insolvent on July 1, 1960. That case involved an application for fees by the attorney for Feigenholtz as Executor. The Appellate Court recognized that there had been no executor's account approved by the Probate Division of the Circuit Court, that there was yet to be determined the matter of the estate's uninventoried claims for an accounting, and held that the appointive assets are equitable assets of the estate. The fact that they do not pass through the probate estate is merely a matter of administration. Their devolution nevertheless turns upon the validity of the contested will. *Snyder* v. *Steele,* 304 Ill. 387, 394, 136 N. E. 649, 651, Section 286 of the Illinois Probate Act, Chapter 3, Illinois Revised Statutes, 1965, paragraph 286.

(d) The opinion below gives no "reasoned justification" for failing to follow *Overby* v. *Gordon,* 177 U. S. 214, and the Brief in Opposition discloses no genuine distinction.

To depart from the reasoning in *Overby* v. *Gordon,* 177 U. S. 214, in effect requires the federal court to determine the validity of claims against an estate and other collateral matters which should be left to the state court. See, *Farrell* v. *O'Brien,* 199 U. S. 89. Petition for rehearing, pp. 19-20.

(e) The opinion below holds that jurisdictional amount is to be determined by the pecuniary consequences to each plaintiff. This ignores respectable authority that jurisdictional amount is to be determined by the pecuniary consequences "to those involved," including defendants. *Thomson* v. *Gaskill,* 315 U. S. 442, 447. *Ronzio* v. *Denver and WR Company,* 116 F. 2d 604, 606-607 (10th Cir. 1940), and that the interest of heirs in the aggregate is the test. *Overby* v. *Gordon,* 177 U. S. 214, cf. *Pinel* v. *Pinel,* 240 U. S. 594, 597.

(f) The opinion below assumes that conditions subsequent to the filing of the action under the control of the defendant executor can be determinative of such pecuniary consequences contrary to *St. Paul Indemnity Company* v. *Red Cab Company,* 303 U. S. 283, 289-290; *Gulf Refining Company* v. *Price,* 232 F. 2d 25, 30, Cert. Denied, 352 U. S. 981 (5th Cir. 1961); *Aetna Casualty & Surety Co.* v. *Flowers,* 330 U. S. 464, 467-468.

(g) The opinion below disregards the good faith claim of plaintiffs as to the pecuniary consequences to them on the ground that the action is not one in which a federal court adjudication of monetary liability to plaintiffs is sought. The fact is, there was no *ad damnum* in the federal court proceeding in *Sears Roebuck and Company* v. *American Mutual Liability Company,* 372 F. 2d 435 (7th Cir. 1967). In good faith petitioners contend that in the absence of a final account approved by the Probate Division of the Circuit Court, it cannot be said that Oscar's probate estate is insolvent and especially, when that estate has an uninventoried claim for an accounting pending.

Petitioners contend that if Oscar's Will is set aside and the appointive assets totaling over $400,000 are distributed to the takers in default of appointment named in Kathryn's Will, nevertheless such takers in default of appointment will hold the assets on a constructive trust for the benefit of Oscar's creditors, wife and children. *In re Estate of Breault,* 63 Ill. App. 2d 246, 264-266; *Gilman* v. *Bell,* 99 Ill. 144, 149-151 (1881), A. L. I. Restatement of Property, § 347 (d), A. L. I. Restatement of Restitution, § 184 (j). The assignment by one of the takers in default of appointment of their "vested remainder" to petitioners is, petitioners suggest, a patent recognition of such constructive trust.

Contrary to the assertion in the Brief in Opposition, it is a fact that only one claim was filed against Oscar's probate estate *at the time this action was commenced* (App. 159). The claims relied on by respondent Feigenholtz

to render Oscar's personal estate insolvent were filed after the commencement of this action in the 12 days remaining for the filing of claims. The statement of the Supreme Court in 1963 that "we see neither waste, wilfullness, nor bad faith" was not intended to approve Feigenholtz' *ex parte* consent to his and Dahm's claim against Oscar's estate. The matter of the validity of those claims approved in an *ex parte* proceeding has yet to be determined. So long as the executor has not filed a current or final account, the *ex parte* claims are subject to being set aside in the probate proceedings. *Bocock* v. *Leet*, 210 Ill. App. 402, 412.

There has been no change of course by petitioners in their efforts to secure an accounting from respondents Feigenholtz and Dahm. Apparently seeking an accounting in the federal court was the wrong route. *Breault* v. *Feigenholtz*, 358 F. 2d 39, 46, but the choice of the wrong route is never an election of remedies. *Southern Pacific Company* v. *Bogert*, 250 U. S. 483, 489-491; *In re Estate of Oppenheim*, 63 Ill. App. 2d 284, 290-291.

The citation proceedings are exactly what respondent Feigenholtz insisted in this Court in No. 203, October Term, 1966, was the right route. (Brief for Respondent in Opposition, No. 203, October Term, 1966, p. 10.)

CONCLUSION.

The Brief in Opposition fails to disclose any reason why this Court should not grant the Petition to decide important questions concerning the proper test for the measure of jurisdictional amount in diversity actions.

Respectfully submitted,

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